NO. 502

MAR 2 1949

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

IRA CHASE KOEHNE and JOHN A. SAVAGE, *Petitioners,*

v.

W. BRUCE MATTHEWS, United States Marshal, and CURTIS REID, Resident Superintendent, District of Columbia Jail, *Respondents.*

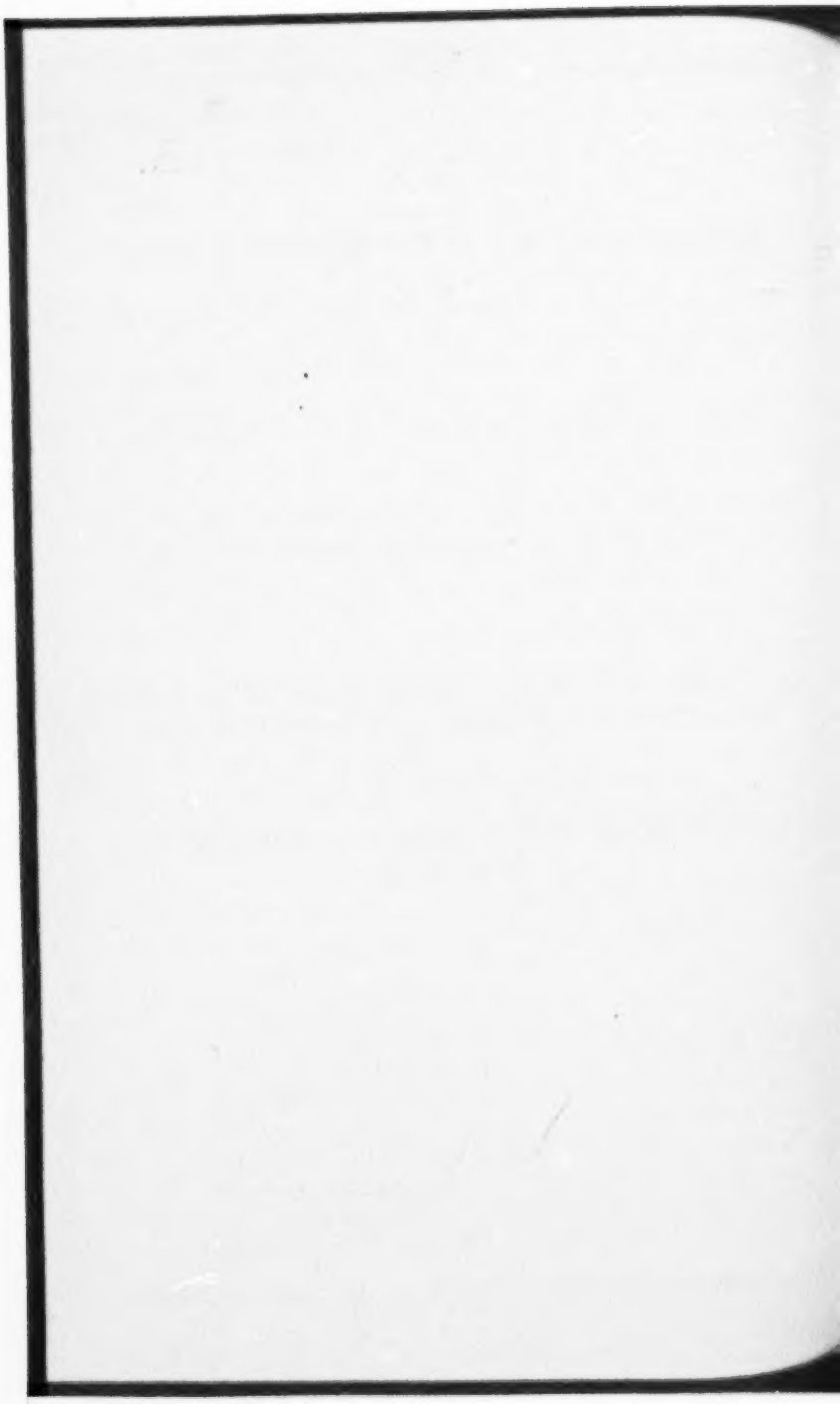
On Petition for a Writ of Habeas Corpus to the United States Court of Appeals for the District of Columbia.

RESPONSE BY PETITIONERS TO MEMORANDUM OF RESPONDENTS.

IRA CHASE KOEHNE,
2803 18th St., N.W.,
Washington 9, D. C.,
Hobart 0032

ORILLE C. GAUDETTE,
1011 Dupont Circle Bldg.,
Washington 9, D. C.,
Dupont 7165
Attorneys for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



INDEX.

Page

The six great questioners of Mr. Kipling..... 2

New Questions, 1-5A, presented arising from consideration of Respondent's Memo and its new matters 2-6

Jurisdiction-less Denial by District Court Q. 1, p. 2; brief p. 7

Appearance of Respondent's Counsel (R. 7) no waiver of next above.....Q. 1A, p. 2; axiomatic

Want of Judicial Power and Due Process in stated mistreatment of Petitioner Savage..Q. 1B, p. 3; brief p. 7

Want of Due Process and Procedure according to law in Savage's purported Trial and Deprivation of Liberty by the Information naming no governmental Complainant .....Q. 1C, p. 3; brief p. 7

Unlawful denial through local court rule of recourse to district judge of petitioner's choice, afforded by Statute herein.....Q. 1D, p. 3, 4; brief p. 9

The (R. 5) Trial Court order "Issuance of Writ Denied" is star-chamber-like, no due exercise of judicial power required by Q. 1 and not according to the will of the law.....Q. 2, p. 4; brief p. 9

In Re multiple mis-statements of fact in Respondent's present brief .....Q. 3, p. 4, 5; brief p. 9

Next preceding matter can't hark back to and vest courts below with power to render Judgments (R. 5, 8) .....Q. 3A, p. 5; brief p. 9

Respondent's counsel's wrongful contention that statutes of general federal applicability apply hereto rather than the local specific Congressional enactments .....Q. 4, p. 5; brief p. 10

In Re Respondent's contention that this Court support the Court next below in its flagrant violation of the hereto applicable Act of Congress (p. 3, Cert. Petition) in deciding this cause according to the

Page

decisions on the appeals of petitioner Savage from his Constitutionless conviction herein, where his being compelled to defend himself in proper person in the Criminal Trial (Municipal) Court, deprived of assistance of Counsel because of which he was unable to present the many complex Constitutional and other questions, without which this habeas corpus cause would be vain; and the inclusion of which in this habeas corpus cause being due procedure in this great writ; and in not deciding this cause according to the averments of the Petition herein (R. 1-5), whose averments, in a denial without hearing, as herein, which, in such event "we must assume that the petitioner's allegations are true. Williams v. Kaiser, 323 U. S. 471, 473, 474," as held in House v. Mayo, 324 U. S. 42, 45, or at least remanded to the trial court for a full presentment and determination of the petitioner's contentions, Price v. Johnston, 334 U. S. 266, 291, 293 Q. 5, 5A, p. 6

AUTHORITIES.

Judicial Power, Due Process and Art. III, Secs. 1 and 2, provisions of Constitution..... 1
Art. I, Sec. 9, Cl. 2..... 2
Art. III, Secs. 1 and 2..... 2
Statutes applicable, p. 3 Certi. Petition.....3, 11, 12
T. 16, Sec. 801, District of Columbia Code (Certi. Pet. p. 3)..... 5, 6
Kennedy v. Silas Mason Co., 339 U. S. 249..... 7
Price v. Johnston, 334 U. S. 269, 291..... 5, 8
Constitution by Mr. Justice Miller..... 8
Muskrat v. United States, 219 U. S. 346, 356..... 8
Adkins v. Childrens' Hospital, 261 U. S. 525, 544.... 8
Kendall v. United States, 12 Pet. 524, 622..... 8
28 U. S. Code, Sec. 2242 (80th Congress)..... 10
T. 16, Sec. 807, District of Columbia Code..... 11
T. 16, Sec. 806, District of Columbia Code..... 11
T. 23, Sec. 101, District of Columbia Code..... 11, 12
District of Columbia v. Stimpson, 40 App. D. C. 498 (R. 15)..... 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 502.

IRA CHASE KOEHNE and JOHN A. SAVAGE, *Petitioners,*

v.

W. BRUCE MATTHEWS, United States Marshal, and CURTIS REID, Resident Superintendent, District of Columbia Jail, *Respondents.*

On Petition for a Writ of Habeas Corpus to the United States Court of Appeals for the District of Columbia.

RESPONSE BY PETITIONERS TO MEMORANDUM OF RESPONDENTS.

The respondents ignoring of the applicable Acts of Congress passed for the government of the District of Columbia (Constitution, Art. 1, sec. 8, cl. 17) and its habeas corpus provisions for such District (Certiorari Petition p. 3) and p. 4 and Question 5 hereof; their counsel's material

misstatements in the Memorandum in Opposition (infra) (question 3) (p. 4) and matters arising from study thereof, prompts the following supplement to the Petition for Certiorari herein in the furtherance of justice and Due Process of Law, with the aid of the six great questioners of whom Mr. Kipling says:

> "I keep six honest serving men,
> (They taught me all I knew)
> Their names are What, and Why and When,
> And How and Where and Who."

NEW QUESTIONS PRESENTED ARISING FROM CONSIDERATION OF MEMORANDUM OF RESPONDENTS AND ITS NEW MATTER.

From this, and the petition for the writ, and its brief, including its p. 8, and that of R. 11-23, the full extent is disclosed of the "judicial" suspensions or neglects to duly employ the due privileges of the great writ of habeas corpus, which suspension or neglect being prohibited by Art. I, Sec. 9, cl. 2 of the Constitution.

QUESTION 1. The judgments herein of both courts below are void—because their exercise of judicial power and jurisdiction herein is precluded by Art. III, Secs. 1 and 2, of Federal Constitution, limiting such exercise to controversies between two or more parties: petitioners being before the court by their petition: but the cause was moot until a respondent was duly before the court in such cause: of which respondents' counsel took advantage by refusing service of Motion Papers, etc. (R. 6)

QUESTION 1A. The want of appearance of respondents' counsel, and of service of process upon either of respondents herein, (Q. 1) in the District Court, is not waived by the appearance of respondents' counsel (R. 7) in the Court of Appeals proceeding herein, which proceeding being limited to its opinion of the legality of such Trial Court proceeding. (R. 5)

QUESTION 1B. Is it the execise of judicial power,—is it due process of law—where a layman in proper person is defending his liberty and property against a criminal charge, without due opportunity to employ counsel of his choice, for the court to permit the defense to be rendered more complex and beyond the ability of such layman because of the consolidation for trial of the three apparently simple though highly technical charges (R. 1, 2, Par. 2, Petition for Certiorari, p. 3 (B)) with the intent to, or having the effect of, misleading such a habeas corpus petitioner into liability of unjust deprivation of his liberty or property, and unnecessarily multiplying the consequent burden upon our courts?

QUESTION 1C. Is it due process of law—or procedure according to law,—is it a lawful information,—to charge anyone in this jurisdiction, especially a layman of the class typified in Q. 1B hereof, by a purported information not brought in the name of the District of Columbia, (R. 14) under purported authority of 1940 D. C. Code, Title 16, Sec. 807 (p. 11 hereof) but in which it is said in material part "Vernon E. West, Esq., Corporation Counsel, by .... assistant in his proper person, comes into court and causes the court to be informed and complains that John A. Savage * * * "?

(It would be as vain should a grand jury of the United States come into court in its proper person and complain not in the name of the United States against any one purportedly accused in a purported indictment.)

QUESTION 1D. Was it lawful or unlawful that this matter in the trial court was acted upon by Judge F. Dickinson Letts, when the petition for this writ was endeavored to be presented to and before Judge T. Alan Goldsborough, by counsel for petitioners, which endeavor was frustrated by local Rule 9(a) of the District Court purportedly requiring that habeas corpus proceedings be heard by the motions judge, who then was said F. Dickinson Letts; whereas the

applicable statute (Certiorari Petition p. 3) provides that seekers for such writs "may apply by petition to the District Court of the United States for the District of Columbia, or any justice thereof, * * * "

(Wherefore, the choice of petitioners of the justice or judge to hear this writ application, granted by said applicable statute, was denied by a purported local rule of the Trial Court, which is wanting in power to thwart such right duly expressed by the Congress.)

QUESTION 2. The blind, reasonless, unexplanatory, star-chamber-like order—"Issuance of Writ Denied"—(R. 5)—is no lawful denial of Question 1, and is no due exercise of judicial power—according to the will of the law, to the serving of which its exercise is limited? Is it not?

QUESTION 3. Why was the material mis-statement of fact made (p. 5, Memorandum of the Respondents in Opposition) that "the fact that there had been an appeal was not mentioned in the petition. Nor was there anything to indicate to the District Court that this avenue of relief was unavailable to Savage, or that he had tried it and failed to obtain relief, or that there were any exceptional circumstances in his case which would justify resort to the extraordinary remedy of habeas corpus. * * * "

(Such mis-statements were asserted and spread upon the records of this honorable court in this matter, by respondents' counsel despite the patent facts (a) that the duly verified petition for habeas corpus herein (R. 1-5) definitely asserted the contrary (b) averring in its Par. 2 (R. 1) that petitioner Savage "charged in the Criminal Division of the Municipal Court for the District of Columbia in three separate criminal informations with alleged crimes or offenses * * * " (Par. 8) (R. 4) " * * * was denied the right to have the assistance of counsel required by the Sixth Amendment which compelled "layman" (Savage) to conduct his defense in proper person; that by reason thereof substantial Constitutional questions and other potent facts,

with their settings, were not before the Trial and Appellate Courts by reason thereof, and relator "(Savage)" is without remedy except by virtue of this great writ.")

Why the further material mis-statement of fact made in note 7 of p. 6 of Memorandum of the Respondents in Opposition, that

> "Now it is contended that the regulations were unconstitutional as applied to any building which had been lawfully erected prior to their adoption (Pet. 3-4, 9-10). The contention is clearly without merit. *The District of Columbia Code does specifically exempt all nonconforming uses of buildings which antedate the adoption of a regulation.* * * *."

The mis-statement character of this quotation is apparent by comparing the italicized text thereof typically with 1940 Code of the District of Columbia, Title 5, sections 302, 303, 304, 305, 308, 422, and T. 11 Sec. 616, which are definitely declared applicable to "any building already erected," i.e., erected before the enactment of the statute or regulation as to structures as well as uses per se lawful.

Relative to the whole of such note 7, each of its alleged different aspects will be embodied in an amended habeas corpus petition under the authority of *Price* v. *Johnston*, 334 U. S. 266, 291, and last two paragraphs p. 293, (Preliminary Point No. 2).

QUESTION 3A. The presently made material mis-statements of fact, forming the subject of Question 3 hereof, could not hark back to the judgments (R. 5, 8) and vest the courts below with power to render such judgments.

QUESTION 4. Respondents counsel seem wrongly to contend in their memorandum for the respondents in opposition, last sentence bottom p. 5, first sentence top p. 6, that the laws of the United States, and not those of the District of Columbia, are applicable to this matter.

(Petitioners cited as applicable and involved herein Title 16, Sec. 801 of 1940 D. C. Code copied (p. 3 Certiorari Petition) which respondents did not deny.)

QUESTION 5. Counsel in their memorandum (bottom p. 5, top p. 6) for the respondents in opposition contend despite, or forgetful of, the averments for Petition of Writ (R. 1-5) quoted in the bracketed matter following Question 3 hereof.

(This is the potent reason why the decisions of the Municipal Court of Appeals and of the United States Court of Appeals (R. 7, 8) on the Savage appeals, are not decisive of this habeas corpus different proceeding. Is this not the law which affords protection by restricting all questions of the sufficiency of habeas corpus petitions tc the face of such petitions as required by the applicable statute (1940 D. C. Code, Title 16, Sec. 801, copied p. 3 Certiorari Petition)).

The application hereto of such construction, established in *Price* v. *Johnston, supra,* assures due process of law comprising definite assignment by district courts of their reasons for denial of such writs, and inviting and permitting amendment of petitions rather than the prior course of filing successive habeas corpus petitions which are more burdensome to our courts as well as to parties to such causes.

QUESTION 5A. Said last stated statute limits the courts in habeas corpus cases to the averments of the petition for habeas corpus in the determination of questions of the sufficiency of such averments by providing " • • • the court or the justice applied to, if the facts set forth in the petition make a *prima facie* case, shall forthwith grant such writ, • • • "; which provision makes unlawful, or at least not pursuant to law, both the purported decisions of this matter by the United States Court of Appeals (R. 7, 8) where it goes into the Savage appellant proceedings in the Municipal Court of Appeals in the respect in which this habeas corpus proceeding was unlawfully denied upon the grounds found by the courts next below in the denial of the Savage appeal; in which respect petitioner Savage, in

the criminal trial was, by denial of assistance of counsel, unable, in his defense in proper person, to raise the available Constitutional questions and the facts of their settings which resulted wrongfully in his conviction.

BRIEF.

A. The memorandum of respondents in opposition, in material parts, is so remote from the applicable facts and law as to be of only minor just and lawful use, as was, for like cause, respondents' brief in the court next below—each being remote from the applicable law because of their misleading of court below, and seeming to attempt to mislead this Honorable Court, to unjustly and unlawfully sustain the District Court herein, by failure to restrict to the face of the petition for habeas corpus questions of the issuance of such writ—pursuant to the mandatory requirement of the applicable statute, Title 16, sec. 801 of 1940 D. C. Code (quoted p. 3 of certiorari petition) which requires that " * * * the court * * * if the facts set forth in the petition make a prima facie case, shall forthwith grant such writ * * * ". Such statute mandate precludes that which occurred in the court next below—obviously the wrongful and unjust sustaining of the denial of this writ without due process of law, and in violation of Art. 1, sec. 9, cl. 2 of our Constitution by suspending or neglecting to duly employ the due and lawful privileges of the writ of habeas corpus, for instance (a) set forth in next above quotation, and (b) such "petition is entitled to the determination in the trial court of "Whether petitioner does or does not have any new information * * * as a matter which should be determined in the first instance by the District Court. And it is one on which petitioner is entitled to be heard either at a hearing or through an amendment or elaboration of his pleadings. Appellate courts cannot make factual determinations which may be decisive of vital rights when the crucial facts have not been developed. Cf. *Kennedy* v. *Silas*

Mason Co., 339 U. S. 249 * * * " *Price* v. *Johnston*, 334 U. S. 266, 291, and its liberalized other holdings. (No. 2 vol. preliminary print.)

B. UPON QUESTION 1.

Mr. Justice Miller, in his treatise on the Constitution, (p. 314) says:

> " * * * It will not do to answer that it is the power exercised by the courts, because one of the very things to be determined is what power they may exercise;" (under the controversy, obviously) "It is, indeed, very difficult to find any exact definition made to hand. * * * It is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a cause before it for decision." (and obviously obtain due appearance or service of process upon, the other party or parties to such controversy).

The above quoted definition was approved in *Muskrat* v. *United States*, 219 U. S. 346, 356.

Mr. Justice Sutherland, in *Adkins* v. *Childrens' Hospital*, 261 U. S. 525, 544, speaks of judicial power as "That power vested in courts to enable them to administer justice according to law."

Says this Court on said article and question, in *Kendall* v. *United States*, 12 Pet. 524, 622,

> "* * * Power must include jurisdiction, which is generally used in reference to the exercise of that power in courts of justice. But power, as used in the Constitution, would seem to embrace both. * * *"

ON Q. 1 B.

The questions raised thereunder have not been heard and determined by the trial court. Hence this cause ought to be remanded for such determination, among other matters, in the affordance of due process herein.

Price v. *Johnston*, 334 U. S. 266, 291, quoted from pp. 7, 8 brief.

ON Q. 1 C.

See statute quoted on pp. 11, 12 hereof, and *District of Columbia* v. *Simpson*, 40 App. D. C. 498, 500, quoted (R. 15) while the relevant material part of each of the three informations is quoted (R. 14).

ON Q. 1 D.

The matter and material part of involved statute is quoted therein, and seems thus obviously to be determined favorable to the intent of the statute and of petition.

ON Q. 2.

The questions raised thereunder have not been heard and determined by the trial court. Hence this cause ought to be remanded for such determination, among other matters, in the affordance of due process herein.

Price v. *Johnston*, 334 U. S. 266, 291, quoted from p. ..... brief.

ON Q. 3.

Questions 3 and 3A seem self explanatory, and are deemed answerable favorable to petitioners.

ON Q. 4.

It has long been the settled construction of this Court that the Congress having power to enact laws for the United States as well as for the District of Columbia, that in such enactment those for the former have no applicability to the latter where enactment for the latter has been exercised. This cause here and in courts below, being a civil cause. (Rules 1, and 81 (2)). Rules of Civil Procedure whose rule 8(2) requires "a short and plain statement of the claim showing that the pleader is entitled to the relief to which he deems himself entitled."

Statute (certiorari petition p. 3), in part of instant materiality, requires that "the court or justice applied to, if

the facts set forth in the petition makes a prima facie case, shall forthwith grant such writ, * * * ",

Which, with the return of respondents, and appropriate replies thereto of petitioners, supported by the evidence, afforded records in each case * * *. Hence, the petition (R. 1-5) was drafted in conformity with Rules 1 and 81 (2), and 8 (2) of Rules of Civil Procedure, and said local statute, rather than as a tedious, wrongful preliminary setting forth of matters of evidence, which respondents' brief herein erroneously presents.

The same is applied to the Federal Habeas Corpus statutes by title 28, U. S. Code sec. 2242, enacted by 80th Congress, providing that habeas corpus petitions "may be amended or supplemented as provided in the rules of procedure applicable to civil actions."

This spirit of justice seems kindredly applicable to the hereto applicable local statute p. 3 Certi. Petition.

Such spirit, and petitioners' construction of such local statute in the form of the petition for habeas corpus (R. 1-5) seems fully confirmed by the first two local statutes, italicized parts, copied in the Appendix hereto.

Questions 5 and 5A relate to statutory construction and seem sufficiently explanatory.

WHEREFORE, in the affordance of due process as lately exemplified in *Price* v. *Johnston, supra,* this cause ought to be remanded to the District Court with appropriate instructions.

Respectfully,

IRA CHASE KOEHNE,
2803 18th St., N.W.,
Washington 9, D. C.,
Hobart 0032

ORILLE C. GAUDETTE,
1011 Dupont Circle Bldg.,
Washington 9, D. C.,
Dupont 7165
Attorneys for Petitioners.

APPENDIX.

D. C. Code 1940 Title 16-807 (24:207) Traversing Return. "Any person at whose instance or in whose behalf a writ of habeas corpus has been issued may traverse the return thereto, *or plead any matters showing that there is not a sufficient legal cause for his confinement or detention,* and the court or justice may issue process for witnesses or for the production of papers, which shall be served and enforced in like manner as similar process issued in a cause depending in court; if the court or justice shall be satisfied of the materiality of the testimony proposed to be adduced. (Mar. 3, 1901, 31 Stat. 1373, ch. 854, sec. 1149)"

Title 16-806-(24:206) Inquiry into cause of detention—Bail-Bond. "On the return of the writ of habeas corpus, and the production of the person detained, *the court or justice shall immediately inquire into the legality and propriety of such confinement or detention, and if it shall appear that such person is detained without legal warrant or authority, he shall immediately be released or discharged;* or if the court or justice shall deem his detention to be lawful and proper, he shall be remanded to the same custody, or in a proper case, admitted to bail, if he be confined on a charge of a bailable offense, and if he be bailed, the court or justice shall require a sufficient bond or recognizance to answer in the proper court, and transmit the same to said court. (Mar. 3, 1901, 31 Stat. 1373, ch. 854, sec. 1148)"

D. C. Code 1940. Title 23-101. CONDUCT OF PROSECUTION—Party Plaintiff. "The attorney for the District of Columbia shall be known as the Corporation Counsel.

Prosecutions for violations of all police or municipal ordinances or regulations and for violations of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia, and by the Corporation Coun-

sel or his assistant. All other criminal prosecutions shall be conducted in the name of the United States and by the attorney for the United States for the District of Columbia or his assistants. (Mar. 3, 1901, 31 Stat. 1340, ch. 854, sec. 932; June 30, 1902, 32 Stat. 537, ch. 1329).

Applied in *District of Columbia* v. *Simpson*, 40 App. D. C. 498; (R. 15), *United States* v. *Capital Trac. Co.*, 38 App. D. C. 469; and *District of Columbia* v. *Moyer*, 68 App. D. C. 98, 93 Fed. (2d) 527.